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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-868

CARTRADE, INC., a corporation,

Petitioner,

vs.

FORD DEALERS ADVERTISING ASSOCIATION OF SOUTHERN CALIFORNIA, a corporation, and FORD MOTOR COMPANY, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief for Respondents Ford Dealers Advertising Association and Ford Motor Company in Opposition.

The question presented is whether the Sherman Act is violated because an association of Ford dealers in Southern California, at the expiration of its contract with plaintiff to provide a car locating service on an exclusive basis, terminated plaintiff's contract and entered into a similar arrangement with another company.

Statement.

The relevant facts, which are stated more fully in the opinion below (App. 2-6) and in the petition (pp. 4-8), may be briefly summarized.

On January 26, 1965 the Ford Dealers Advertising Association of Southern California (FDAA) contracted with plaintiff to become the exclusive car locating or car trading agency for FDAA members for a year, with an option in FDAA to renew. Prior to this time there had been another car locating service known as Dealers Exchange.[1] Such a service enables a Ford dealer who does not have a Ford model requested by a customer to ascertain whether another Ford dealer has the model in stock and is willing to trade it. This permits Ford dealers to provide customers with the cars they want more speedily, and thereby serves to improve their competitive position as against dealers in other makes of cars.

At the end of the year FDAA agreed to renew the contract with plaintiff on a month to month basis, but at the end of the month terminated the contract and entered into a similar arrangement with another organization, Dealers Trade. There is no evidence that this was done for any anti-competitive purpose, or for any reason other than dissatisfaction with plaintiff's performance and its financial situation as manifested by its inability to pay the amount owing to Dealers Exchange. The minutes of a meeting of the FDAA Board on December 13, 1965, stated that [Ex. 16, p. 2]:

> "* * * apparently, Mrs. Robinett [owner of plaintiff] was in arrears to the extent of $7,000.00 in her payments to Mr. Lewis, and it would appear that an impasse had been reached

[1] Earlier in January 1965, petitioner bought Dealers Exchange, with which it had been competing, from its owner, Robert Lewis. Thereafter a controversy arose because petitioner (1) fell behind in its payments, and (2) claimed that it had been misled by Dealers Exchange's overstatement of its business prior to the acquisition.

between the two; and, in finalizing the entire situation, it was the consensus of the Committee, as well as the Association's legal counsel, that, unless Mr. Lewis and Mrs. Robinett could arrive at a complete and amicable settlement of their differences, no contract be entered into by the Ford Dealers Advertising Association of Southern California with either Car Trade, Inc. or Dealers Exchange, Inc."

Mrs. Robinett and Lewis had been advised of this at a business meeting of the FDAA Car Trade Committee, at which it was also resolved [Ex. 17]:

> 1. That the Association should not pay membership dues to more than one car trade or exchange organization;
>
> 2. That from the standpoint of a complete spread and the maximum inventory upon which to draw, that it is desirable that this Association deal with only one car trade organization; and, that whatever arrangement may be made, such organization would have to afford thorough coverage, by telephone or otherwise, for all of Southern California.

At a subsequent meeting, at which it was determined to continue the relationship with plaintiff only on a month-to-month basis, Mr. Buerge (Chairman of the Car Trade Committee) stated that "the Association would be unable to do business with Mrs. Robinett for the reason she will, undoubtedly, have payroll problems, and the Association would, no doubt, get involved in them" [Ex. 18, p. 4]. Thereafter he told Mrs. Robinett "that in any event an improved service was wanted by the Association" [Ex. 19, p. 2]. Mr. Buerge

then reported to the Board "that the present system of car trading, through Car Trade, Inc., is not adequate —that the Ford dealers needed a better service—that if they did have a better service, the dealers could 'increase, to a substantial degree, the sale of Ford cars" [Ex. 20, p. 5], and Mr. Hauter (FDAA chairman) reported receipt of a letter from a dealer which stated "the present car trade service was very bad" [Ex. 22, p. 4].

When called by plaintiff as a witness, Mr. Buerge testified that in January 1966 "we did not renew the contract because of the difficulty we were having in having them function, and we put them on a month-to-month basis, and tried to work them to see if they could begin functioning for us so we could continue on with them" [RT 463-B]. Buerge further testified that in February, after FDAA had decided to make a change, he told Mrs. Robinett [RT 469-470]:

> "* * * that we no longer could tolerate the operation as it was existing with the few employees that they had, that they weren't able to take care of the Ford dealers in the car trading, and that the Ford dealer organization was being damaged and that we could not tolerate the payoffs[2] that was being required by the organization to obtain automobiles, which we had warned her about before, and that we had given her a chance to see if she could get the business corrected so that we could continue with her and we had hoped to be able to continue with her, but it had become so intolerable that we could no longer continue."

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[2] "Payoffs" refers to plaintiff's insistence on being paid more than the amount specified in the contract for locating "highly desirable cars" [RT 472].

Additional evidence of plaintiff's financial and other difficulties appears in Buerge's testimony that a Cartrade employee told him that she and another employee

> "* * * were definitely leaving, that they no longer could get their checks cashed without going to the bank many times, * * * and that she couldn't sleep at night because of the overwork and that the place was not supervised any longer —" [RT 529-530].

The Ford local sales office had furnished plaintiff (at cost) a copy of its IBM dealer inventory lists, which greatly facilitated the determination of which dealers had particular models in stock. In February 1966, the Ford office decided to supply the list only to FDAA, which could thereafter turn it over to any car locating service it chose. FDAA thereafter supplied the list only to the service with which it was contracting, Dealers Trade, not to plaintiff. . .

ARGUMENT.

The Court of Appeals affirmed the granting of a directed verdict for defendants at the close of plaintiff's case on two grounds. Though not denying that the service involved was, or could be treated as, interstate commerce, the court found that switching from one car locating service to another had no effect either on interstate commerce in Ford cars or on competition. The court also found that merely to transfer an exclusive service contract from one company to another, even though the inevitable effect is to deprive the former of its business, does not violate the antitrust laws.

Many other cases have held that in the absence of anti-competitive reasons, to transfer an exclusive distributorship from one person to another does not vest the former with an antitrust cause of action. *E.g. Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F. 2d 283, 286-287 (6 Cir., 1963); *Scanlan v. Anheuser-Busch, Inc.*, 388 F. 2d 918, 921 (9 Cir., 1968); *Interborough News Company v. Curtis Pub. Co.*, 225 F. 2d 289, 293 (2 Cir., 1955); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d 418, 421 (App. D.C. 1957). In the *Packard* case Chief Judge Edgerton stated: "The fact that any other dealers in the same product of the same manufacturer are eliminated does not make an exclusive dealership illegal; it is the essential nature of the arrangement." Other authorities to the same effect are collected in *Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F. 2d 71, 76 (9 Cir., 1969), certiorari denied, 396 U.S. 1062. The same principle applies to an exclusive service contract. Otherwise, as the court below pointed out, "To

find liability here would be to saddle the dealers with Cartrade's services forever" (App. 12).

The *Hawaiian Oke* case, which this Court refused to review, applied the same principle when two liquor producers, both aware of what the other was doing, simultaneously decided for independent reasons to transfer a distributorship from the plaintiff to another company. Here the FDAA had better reasons for acting on behalf of its members jointly than did the separate companies in the *Hawaiian Oke* case. For if a car locating enterprise is to perform its function of facilitating the interdealer transfer of cars desired by customers as effectively as possible, it should provide service for *all* Ford dealers in the area. As the court below declared (App. 12):

> "We can see how a single cartrader having in its possession the inventory of every Ford dealer, might do—or in good faith be believed by the dealers to be likely to do—a better job for the dealers, with less expense to them and less waste of their time than competing cartraders would be able to do."

The case is thus similar to the joint contract entered into by the railroads serving Chicago for the transfer of passengers between terminals (*Parmelee Transportation Co. v. Keeshin*, 292 F. 2d 794, 804 (7th Cir., 1961), and to the contract for four retail stores to combine to use a single delivery service when separate services could not be operated profitably. (*Instant Delivery Corp. v. City Stores Co.*, 284 F. Supp. 941, 947 (E.D. Pa., 1968).) In each of those cases the company deprived of the joint contract complained of a boy-

cott, but the courts found that the anti-trust laws had not been violated. As stated in the *Instant* case:

> "In the case at bar, the only 'refusal to deal' with Instant was that inherent in the selection of some other carrier to perform the consolidated delivery service. The 'exclusion' was a byproduct of the decision to reinstitute consolidated delivery which necessarily involves the use of one carrier. . . . I find nothing in this record to evidence an intent to discriminate against or to exclude Instant . . . Instant is a disappointed competitor, not the object of an illegal boycott."

The same analysis applies to the case at bar. The record does not suggest that respondents had any reason to prefer one car locating service to another apart from considerations related to providing the dealers with a more efficient operation. No claim is made that either respondent was in the cartrading business or had any financial interest in the new cartrading entity, Dealers Trade. Plaintiff's effectiveness was reasonably thought to be impaired by its inability to pay its debt to the company it had taken over the year before. The uncontradicted testimony and exhibits introduced *by plaintiff* showed that a cause of plaintiff's termination was the failure of plaintiff to settle this dispute, as well as complaints that plaintiff was not providing the dealers with adequate service. See pp. 3-4, *supra*. Such purposes or motives are not inconsistent with antitrust law or policy.

Nor was it unreasonable for defendants to conclude that for them to continue to support only a single

cartrading service would be more economical and efficient. It was for this reason that FDAA obtained only one set of the IBM lists, for the service with which the contract was made. Plaintiff's contention that businessmen with 100% of the market were excluding "a competitor" from the business ignores these facts, as well as the fact that defendants were not competitors of plaintiff.

This was not true in the three cases petitioner incorrectly asserts to be in conflict with the decision below. *Gamco v. Providence Fruit and Produce Building, Inc.*, 194 F.2d 484 (1st Cir., 1952); *Ricci v. Chicago Mercantile Exchange*, 447 F. 2d 713 (7 Cir., 1971), petition for certiorari filed January 3, 1972, No. 71-858; *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). In each of those cases a company or association controlled by the plaintiff's competitors decided to exclude plaintiff from the market or exchange, or to deprive it of information which would enable it to compete, for no justifiable reason. This appears from the very passage from the *Gamco* case quoted on page 11 of the petition. In that case, upon which petitioner puts the most emphasis, the lessor of the only building suitable for produce merchants' operations agreed with plaintiff's competitors, who were occupants of the building, that the space would not thereafter be available for plaintiff's produce operations. Here neither Ford nor its dealers were in competition with plaintiff, and the purpose of the transfer was to aid Ford dealers in competing with other automobile dealers,

not to hurt plaintiff. Thus, to use the language of *Gamco*, respondents did "come forward and justify" the substitution of one cartrader for another.

Cartrade misstates the record when it characterizes Ford's and FDAA's conduct as having an "express purpose to exclude Cartrade from competing in the car-trading business" (Pet. 17). As shown above, the evidence makes clear that the reasons for the decision were that FDAA was dissatisfied with Cartrade's performance and its inability to resolve its dispute with its vendor, Dealers Exchange. The record here discloses reasonable and bona fide efforts on the part of FDAA in trying to persuade and assist Cartrade to solve its problems and continue on as a viable cartrading entity.

Repondents, of course, knew that transferring their patronage and the IBM lists from plaintiff to the new company would exclude plaintiff from the business. Every supplier knows that the transfer of an exclusive franchise from one distributor to another will have such an effect, and in one sense can therefore be said to intend that result. But this is not sufficient to establish an anti-competitive motive in cases of this sort.

The court below was also clearly right in holding that "there is no evidence that the substitution of Dealers Trade for Cartrade had any effect upon interstate commerce in Ford cars" (App. to Pet. 8). See:

Uniform Oil Co. v. Phillips Petroleum Co., 400 F. 2d 267, 269-270 (9th Cir., 1968);

Lieberthal v. North Country Lanes, Inc., 332 F. 2d 269, 272 (2nd Cir., 1964).

Conclusion.

The decision below is thus consistent with the authorities and plainly correct. No basis for review by this Court has been shown. The petition should therefore be denied.

Respectfully submitted,

ROBERT L. STERN,
F. B. YOAKUM, JR.,
Counsel for Respondent Ford Motor Company.

DEWITT M. MANNING,
Counsel for Respondent Ford Dealers Advertising Association.

Dated: February 28, 1972.

IVERSON, YOAKUM, PAPIANO & HATCH,
GETZ, AIKENS & MANNING,
Of Counsel.